

Testimony of Robert Wiygul on Behalf of the Sierra Club, Four  
Corners Action Coalition, Taxpayers for the Animas River and  
Earthjustice Legal Defense Fund

Submitted to the Senate Committee on Indian Affairs

June 7, 2000

S. 2508

## MEMBERS OF THE SUBCOMMITTEE:

I appreciate the opportunity to offer this testimony on S. 2508. I am an attorney with the Earthjustice Legal Defense Fund in Denver, Colorado, and I have for some years advised a number of grassroots organizations, including Taxpayers for the Animas River, the Sierra Club, and the Four Corners Action Coalition with respect to the Animas-La Plata project and its compliance with federal laws. These organizations oppose S. 2508.

The Animas-La Plata project has a long history of controversy. It began as a massive irrigation project, which due to its poor economics and high environmental costs could not be built. In the mid-1980's it became a proposed solution to the perceived problem of Winters Doctrine water rights claims by the Southern Ute and Ute Mountain Ute tribes. The concern was that these Winters Doctrine claims could impact senior water rights holders in the Four Corners area. During the 1990's it became clear, however, that the project still provided few benefits at a very high cost, and had unacceptable environmental impacts.

The version of the Animas-La Plata project proposed in the pending legislation, and the companion legislation in the House is smaller than past versions, and it gives more of the water in the project to the Ute tribes. Unfortunately, however, it shares with past versions the problem that it provides few benefits at a high cost. Let me identify for you several basic remaining problems with the project.

First, the environmental impacts from drawing substantial amounts of water from the Animas river remain, and the impacts associated with potential (since there are no actual) uses have never been examined. At pages 3-97 and 3-98 of its Draft Environmental Impact Statement (DEIS), the Bureau of Reclamation states that downstream impacts of the water withdrawals from the Animas River will have significant impacts on native fish in the river. The DEIS also concedes that up to 3000 acres of upland habitat will be affected. Large amounts of power will be used to pump water uphill for no identified purpose. It is also true that forecasting the impacts of projects like this one is an inexact science, and the true impacts may not become clear until after the project is built.

These impacts are clearly less than those associated with the older versions of Animas-La Plata, but they are nonetheless real. These impacts are particularly problematic in that there are no benefits against which to measure these impacts. The Administration takes the position that no cost\benefit analysis of the project is necessary either under NEPA or the reclamation statutes. This is simply not correct. There is no legal precedent for this position with respect to Indian water rights settlements. Even if the Administration's position that Indian water rights settlements are exempt from this requirement, about a third of the water in the project as proposed goes to non-Ute entities. Clearly these entities must abide by the law, and the law requires that federally funded projects such as this have a cost\benefit analysis.

It is also clear that some use for the water must be identified if alternatives are to be given a fair evaluation under Section 404 of the Clean Water Act. The evaluation found in the draft EIS for the Administration proposal does not identify any uses, but simply assumes that providing

municipal and industrial water is the goal. This will not pass muster under the Clean Water Act.

To be honest, it appears that the reason the Administration takes the position that no uses must be identified, and that no cost/benefit ratio need be prepared, is that it knows that there are no identified uses associated with the project, and as a result there are no identifiable economic benefits flowing from it. An economic study commissioned by Earthjustice and the Sierra Club found that based on the information in the DEIS, it appeared that there were no economic benefits associated with the project.

S. 2508 does, of course, contain sufficiency language, which is clearly aimed at insulating this project and its compliance with NEPA and other statutes from judicial review. We obviously oppose any such language very strongly, and we believe the Administration should stand by its position and oppose this legislation because it contains such language.

We also would urge to committee not to prematurely accept, through this sufficiency language, the analysis under Section 404(r) the Department of the Interior has prepared. That analysis does not accurately analyze the environmental impacts of either the Administration proposal or the non-structural alternative that various conservation interests have proposed. For example, it assumes that large amounts of wetlands will be destroyed by the non-structural alternative, but it gives no specific support for this conclusion. It also assumes that these assumed losses – which are of wetland created by irrigation, not natural wetlands – cannot be mitigated, and that what mitigation can be done must be at a very high cost. None of these assumptions are correct, and they fatally undermine the Department of the Interior's 404 analysis.

In closing, let me state again for the record that the Four Corners Action Coalition and the other groups opposing the Animas-La Plata project do not oppose the Ute tribes. We believe their water rights should be respected. We believe it is unfortunate that senior water rights holders in the Four Corners area have not respected those rights. We continue to believe, however, that there are better ways to recognize those rights than building Animas-La Plata. We have proposed in good faith a non-structural alternative which is feasible, and which we believe, given a fair analysis, would be superior to the Administration proposal or the project proposed in S. 2508.